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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re D.P. et al., Persons Coming Under the Juvenile Court Law.

SAN FRANCISCO HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

K.S.,

Defendant and Appellant.

A145254

(San Francisco County Super. Ct. Nos. JD153051, JD153051A)

The juvenile court removed D.P. and K.J.P. (collectively, children) from K.S.'s (mother) custody. Following a combined jurisdictional and dispositional hearing, the court adjudged the children dependents of the court (Welf. & Inst. Code, § 300, subd. (b)), removed them from mother's custody, and denied mother reunification services (Welf. & Inst. Code, § 361.5, subd. (b)(10)).[1]

Mother appeals. She contends: (1) the court erred by denying her reunification services; and (2) the San Francisco Human Services Agency's (Agency) failure to

[1] Father Melvin P. (father) is not a party to this appeal and is mentioned only where necessary. Unless noted, all further statutory references are to the Welfare and Institutions Code.

comply with the Indian Child Welfare Act (25 U.S.C. § 1901 (ICWA)) requires conditional reversal of the dispositional order. We conclude the court properly denied mother reunification services pursuant to section 361.5, subdivision (b)(10). We affirm the dispositional order and remand for the limited purpose of ensuring compliance with ICWA-related duties of inquiry and notice.

FACTUAL AND PROCEDURAL BACKGROUND

Half-Siblings and Mother's Substance Abuse

Mother had her first child, N.S., in 1993, when she was 15 years old. Her second child, R.H., was born in 1996, and her third child, M.H., was born in 2002 (collectively, half-siblings). Mother began using marijuana in 2002 and methamphetamine shortly thereafter. As relevant here, in 2003, the Agency filed petitions alleging the half-siblings came within section 300, subdivision (b). Mother submitted to the allegations that she "may have a substance abuse problem" requiring "assessment [and] possible treatment" and that she neglected N.S.'s health because he had "an untreated broken tooth." The court declared the half-siblings dependents, placed them in foster care, and ordered reunification services for mother. At the 12-month review hearing in 2004, the court terminated reunification services, concluding mother had made only "minimal" progress toward alleviating the conditions necessitating the filing of the section 300 petitions. Mother did not reunify with the half-siblings.

Detention

D.P. was born in February 2010. In late 2010 or early 2011, mother claimed to have completed a residential drug treatment program. In 2012, the Agency received referrals that mother was selling and using drugs.[2] The "common theme" of the referrals was mother's "substance abuse[.]"

In February 2015, K.J.P. was born nine weeks prematurely and tested positive for amphetamines. A few days later, the Agency filed a petition alleging the children came

[2] The Agency concluded the referral that mother was selling drugs was unfounded, but could not determine the validity of the other referral because the social worker was "unable to meet with [mother to] assess the situation."

within section 300, subdivisions (b) and (j). The operative petition alleged, among other things: (1) mother tested positive for methamphetamine and marijuana while pregnant with K.J.P.; (2) K.J.P. tested positive for illegal drugs at birth; (3) mother had a substance abuse problem requiring treatment because she used drugs during her pregnancy and repeatedly "minimized the issue when asked about her drug use[;]" (4) mother's substance abuse was "associated with the removal" of the half-siblings; and (5) mother "seriously neglected" D.P.'s "dental needs[,]" causing him to develop "severe" rotten teeth.

According to the detention report, mother denied using methamphetamine while pregnant and claimed it "must have unknowingly been in the marijuana she consumed . . . to help her sleep[.]" Mother refused residential drug treatment and instead offered to take outpatient drug classes. Finally, mother claimed D.P.'s teeth were not rotten and "simply need to be extracted." At the conclusion of the detention hearing, the court determined the children came within section 300 and placed them in foster care.

Jurisdiction and Disposition

The March 2015 jurisdictional and dispositional report recommended declaring the children dependents and denying mother reunification services pursuant to section 361.5, subdivision (b)(10). According to the report, mother had an "extensive criminal history" and was convicted of receiving stolen property shortly before K.J.P. was born. Mother used methamphetamine and marijuana while pregnant with K.J.P. and did not receive prenatal care. Mother denied having a substance abuse problem or using methamphetamine while pregnant. The Agency's report also noted the half-siblings were removed from mother's care "due to her substance abuse" and she failed to reunify with them.

In a May 2015 addendum report, the Agency noted mother was "currently incarcerated . . . for 3 felony weapon charges, 1 felony terrorist threat charge and 1 misdemeanor weapon charge." Mother tested positive for methamphetamine and marijuana in March 2015. The Agency continued to recommend denying mother reunification services because she had "not taken the necessary steps to address her

addiction. The current dependency matter stems directly from her substance abuse and her subsequent neglect of [the] children . . . . The circumstance for the current dependency matter mirrors that of [mother]'s prior dependency" with the half-siblings.

At the May 2015 jurisdictional and dispositional hearing, a social worker testified mother used drugs while pregnant with K.J.P. and opined mother "had an ongoing [drug] addiction or had severely relapsed[.]" Another social worker testified mother "had done very little" to engage in services in the six weeks following the children's removal: she minimized her prior substance abuse use, tested positive for illegal drugs, and did not engage in drug treatment. The social worker testified it was in the children's best interest to bypass reunification services because the current dependency "mirror[ed]" significantly mother's "previous dependency with her substance abuse, the medical neglect of the children, and the fact that . . . she has not benefitted from the previous dependency matter." According to a third social worker, mother claimed she was sober from 2009 to late 2014, despite having been arrested for possession of a controlled substance in 2013 and 2014.

At the conclusion of the hearing, mother submitted on the allegations she tested positive for methamphetamine and marijuana while pregnant with K.J.P., K.J.P. tested positive for illegal drugs at birth, and that she had a substance abuse problem requiring treatment. The court found true the remaining allegations that mother's substance abuse was "associated with the removal" of the half-siblings and mother "seriously neglected" D.P.'s "dental needs[,]" causing him to develop "severe" rotten teeth. The court determined the children could not be returned to mother, noting her "contin[ued] struggles with substance abuse[.]" Additionally, the court concluded mother's "progress . . . towards mitigating the causes necessitating placement has been none to minimal." Finally, the court denied mother reunification services, concluding by clear and convincing evidence mother had not made reasonable efforts to treat the problems leading to the removal of the half-siblings.

ICWA Notice

In early February 2015, mother told the Agency she had "Native American ancestry" but "could not identify a tribe." The next day, mother named the children's maternal grandmother, Angela S., maternal great grandmother, Betty S., and maternal great-great-grandmother, Dorothy W., and gave the Agency the dates of their deaths. According to mother, Betty S. and Dorothy W. were "originally from Louisiana" and were possibly affiliated with the Cherokee tribe. Mother completed form ICWA-020 (Parental Notification of Indian Status) indicating she had "maybe Cherokee" ancestry.

The Agency's form ICWA-030 (Notice of Child Custody Proceeding for Indian Child) reported the children may have been eligible for membership in the Cherokee tribe. The form contained information about mother, Angela S., and Betty S., but not Dorothy W. The United Keetoowah Band of Cherokee Indians declined to intervene and the Eastern Band of Cherokee Indians determined the children were not eligible to register as members of the tribe. The court later determined ICWA did not apply.

DISCUSSION

I.

The Court Properly Denied Mother Reunification Services Pursuant to Section 361.5, Subdivision (b)(10)

Mother claims insufficient evidence supports the order denying reunification services pursuant to section 361.5, subdivision (b)(10). Under that statute, reunification services need not be provided to a parent when the juvenile court finds by clear and convincing evidence "the court ordered termination of reunification services for any . . . half siblings of the child because the parent . . . failed to reunify with the . . . half sibling after the . . . half sibling had been removed from that parent . . . and that parent . . . is the same parent or guardian described in subdivision (a) and that, according to the findings of the court, this parent . . . has not subsequently made a reasonable effort to treat the problems that led to removal of the . . . half sibling of that child from that parent[.]" (§ 361.5, subd. (b)(10).) To apply section 361.5, subdivision (b)(10), "the juvenile court must find both that (1) the parent previously failed to reunify with a . . . [half-sibling] and

(2) the parent has not subsequently made a reasonable effort to treat the problems that led to removal of the . . . [half-sibling]. [Citations.]" (*In re Albert T.* (2006) 144 Cal.App.4th 207, 217.) We affirm the court's order denying reunification services pursuant to section 361.5, subdivision (b) if supported by substantial evidence. (*Cheryl P. v. Superior Court* (2006) 139 Cal.App.4th 87, 96 (*Cheryl P.*).) In making this determination, we resolve all conflicts in favor of the prevailing party. We do not reweigh the evidence. (*In re Jasmine C.* (1999) 70 Cal.App.4th 71, 75 (*Jasmine C.*).)

Mother contends the half-siblings were not removed for the same reasons the children were removed. She is wrong. The Agency removed the half-siblings from mother's care because she was using methamphetamine and marijuana and she neglected N.S.'s dental health. The record overwhelmingly demonstrates the children were removed for identical reasons: mother's substance abuse and her refusal to ensure her children received proper dental care. At the jurisdictional hearing, mother admitted having a substance abuse problem and using methamphetamine and marijuana while pregnant with K.J.P. The court determined mother's substance abuse was "associated with the removal" of the half-siblings and mother "seriously neglected" D.P.'s "dental needs[,]" causing him to develop "severe" rotten teeth.

Mother's reliance on *In re D.H.* (2014) 230 Cal.App.4th 807 is misplaced. In that case, the appellate court concluded insufficient evidence supported the denial of the father's reunification services because the record reflected the half-siblings were "living in 'unsafe and unhealthy conditions'" but not "that those unsafe and unhealthy conditions were caused by [the] father's alcohol use, anger management problems or domestic violence—the problems that led to" the removal of the children in the dependency at issue. (*Id.* at p. 816.) *In re D.H.* is distinguishable. Here the evidence overwhelmingly demonstrated the problems leading to the half-siblings' removal were *identical* to the problems leading to the removal of the children.

Next, mother claims the court erred by concluding she did not make reasonable efforts to treat the problems leading to the half-siblings' removal. Mother correctly notes the "'reasonable effort to treat'" standard under section 361.5, subdivision (b)(10) "is not

synonymous with 'cure.'" (*Renee J. v. Superior Court* (2002) 96 Cal.App.4th 1450, 1464.) But to be reasonable, the parent's efforts must be more than "lackadaisical or half-hearted[.]" (*Cheryl P., supra,* 139 Cal.App.4th at p. 99.) Here, mother's efforts were — at best — half-hearted. Mother was using drugs in 2003, when the half-siblings were removed. In 2009, she was still using methamphetamine. In 2013 and 2014, she was arrested for drug possession, and she used methamphetamine and marijuana while pregnant with K.J.P. When the children were removed, mother declined inpatient drug treatment, and she continued to use drugs. At the jurisdictional and dispositional hearing, a social worker testified mother "had an ongoing [drug] addiction . . . [.]" Without more, mother's claim that she completed a drug treatment program in 2010 or 2011 does not constitute "reasonable efforts" to treat her substance abuse problem. Evidence of mother's continuing drug use — and her failure to attend a substance abuse treatment program after the children were removed — constitute clear and convincing evidence she had not made reasonable efforts to treat the problems that led to removal of the half-siblings. (*Jasmine C., supra,* 70 Cal.App.4th at p. 76 [mother, a chronic substance abuser, was incarcerated; evidence of mother's "reoffending" established she did not make a "reasonable effort" under section 361.5, subdivision (b)(10)].)[3]

Nor did mother satisfy her burden to establish it was in the children's best interest for her to receive reunification services. When the prerequisites of section 361.5, subdivision (b)(10) are met, the court "shall not" order reunification services for the parent unless it "finds, by clear and convincing evidence, that reunification is in the best interest of the child." (§ 361.5, subd. (c).) Thus, "'"'once it is determined one of the situations outlined in [section 361.5,] subdivision (b) applies, the general rule favoring reunification is replaced by a legislative assumption that offering services would be an unwise use of governmental resources. [Citation.]"' [Citation.] The burden is on the

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[3] The half-siblings were removed in 2003 because N.S. had "an untreated . . . broken tooth." In 2015, mother had "seriously neglected" D.P.'s "dental needs[,]" causing him to develop "severe" rotten teeth. Mother refused to acknowledge the problem and claimed D.P.'s teeth "simply need[ed] to be extracted."

parent to change that assumption and show that reunification would serve the best interests of the child." (*In re William B.* (2008) 163 Cal.App.4th 1220, 1227.) In the juvenile court, mother did not demonstrate reunification was in the children's best interest. We conclude the court properly denied mother reunification services pursuant to section 361.5, subdivision (b)(10). (*Jasmine C., supra*, 70 Cal.App.4th at p. 76.)

II.

Conditional Reversal for the ICWA Notice Violation is Not Required

Mother contends the Agency failed to comply with ICWA notice requirements. The Agency concedes the notice was inadequate because it did not include information about Dorothy W., the children's great-great grandmother. (See *In re S.E.* (2013) 217 Cal.App.4th 610, 615 [ICWA notice must include information about the child's great-great grandfather].) The parties urge us to conditionally reverse the dispositional order and remand for ICWA compliance. Appellate courts have endorsed this procedure in appeals from orders terminating parental rights where there is inadequate compliance with ICWA notice requirements. (*Id*. at p. 616 [conditional reversal appropriate on appeal from guardianship order]; *In re Francisco W.* (2006) 139 Cal.App.4th 695, 711 [appeal from order terminating parental rights]; *In re S.M.* (2004) 118 Cal.App.4th 1108, 1123 [termination of parental rights].) This appeal is not from an order terminating parental rights.

"'[A] notice violation under [the] ICWA is not jurisdictional in the fundamental sense, but instead is subject to a harmless error analysis. [Citations.]' '"To hold otherwise would deprive the [trial] court of all authority over the dependent child, requiring the immediate return of the child to the parents whose fitness was in doubt." [Citation.] An appellant seeking reversal for lack of proper ICWA notice must show a reasonable probability that he or she would have obtained a more favorable result in the absence of the error.' [Citations.]" (*In re Christian P.* (2012) 208 Cal.App.4th 437, 452 (*Christian P.*); see also *In re Veronica G.* (2007) 157 Cal.App.4th 179, 188 (*Veronica G.*).) Thus, reversal is appropriate for an ICWA violation only when parental rights have been terminated or when the party challenging the order establishes prejudicial error.

(*Christian P., supra,* 208 Cal.App.4th at pp. 452-453; *Veronica G., supra,* 157 Cal.App.4th at p. 187.) Here, mother has not demonstrated she would have obtained a more favorable result at the combined jurisdictional and dispositional hearing in the absence of the ICWA notice error. As a result, reversal is not appropriate.

Here, the appropriate disposition is to affirm the dispositional order with a limited remand to the juvenile court to order the Agency to comply with ICWA's inquiry and notice provisions. (*Christian P., supra,* 208 Cal.App.4th at pp. 452-453 [affirming dispositional order but remanding for ICWA compliance]; *Veronica G., supra,* 157 Cal.App.4th at pp. 187-188 [affirming jurisdictional order and remanding for ICWA compliance].) If it is determined ICWA applies, then the children, mother, or the interested tribe may petition the juvenile court to invalidate any orders that violated ICWA. If it is determined that ICWA is inapplicable, any prior defective notice becomes harmless error. (*Christian P., supra,* 208 Cal.App.4th at pp. 452-453; *Veronica G., supra,* 157 Cal.App.4th at p. 188.)

DISPOSITION

The dispositional order denying mother reunification services is affirmed, and the matter is remanded to the juvenile court with directions to comply with ICWA's inquiry and notice provisions, if it has not already done so. After proper notice is given under ICWA, if it is determined D.P. and K.J.P. are Indian children and ICWA applies to these proceedings, any interested party is entitled to petition the juvenile court to invalidate orders that violated ICWA. (See *Christian P., supra,* 208 Cal.App.4th at pp. 452-453.)

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Jones, P.J.

We concur:

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Needham, J.

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Bruiniers, J.